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No. 216

Supreme Court of the United States

OCTOBER TERM, 1958

NATIONAL BANK OF DETROIT, *Petitioner*,

v.

THE WAYNE OAKLAND BANK and RAY M. GIDNEY, Comptroller of the Currency, *Respondents*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF WAYNE OAKLAND BANK IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioner National Bank of Detroit filed its petition for certiorari on July 24, 1958. Respondent Wayne Oakland Bank obtained from the Court an extension to and including September 8, 1958, for filing this Brief in Opposition.

STATUTES AND REGULATIONS INVOLVED

The petition sets forth at pages 3-5 the relevant sections of the National Bank Act and the Michigan Financial Institutions Act involved in this proceeding.

In addition, certain regulations of the Comptroller of the Currency (12 CFR § 4.5) are pertinent to the issue, and these have been set forth in Appendix A, *infra*.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. The National Bank Act (12 U.S.C. 36), *inter alia*, permits a national bank to establish and operate branches at any point within the state in which the national bank is situated if such establishment and operation are at the time authorized to state banks by the statute law of the state in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the state on state banks. Section 34 of the Michigan Financial Institutions Act, *inter alia*, permits a state bank to establish and operate a branch or branches within a village or city other than that in which it was originally chartered provided that no such branch shall be established in a city or village in which a state or national bank, or branch thereof, is then in operation. In view of such statutory provisions, can a national bank establish a branch in a city other than that in which its main office is located if there is then in operation in that city a branch of a state bank.

2. Where applicable law prohibits the establishment by a national bank of a branch in a city in which a branch of a state bank is then in operation, and the competition which will result from the establishment and operation of the branch of the national bank will cause irreparable injury to the state bank, may the state bank maintain this suit to enjoin the establishment and operation of the branch of the national bank and to enjoin the Comptroller from issuing his certificate under 12 CFR § 4.5(a)(3) with respect to such branch.

PRELIMINARY STATEMENT

Before discussing the particular points raised in the petition for writ of certiorari filed in this case, there are some preliminary matters which we believe should be brought to the Court's attention.

In several places the petition implies that the Comptroller's letter of March 19, 1956 was the statutory approval required by 12 U.S.C. 36(c).[1] This was a matter of considerable contention in the courts below. We should point out that one of the things which the Court of Appeals held in its opinion denying the motion for rehearing was that the statutory approval was not given until the certificate required by 12 CFR 4.5(a)(3) is issued. That certificate with respect to the proposed Troy branch of National Bank of Detroit had not been issued at the time this suit was started and its issuance was enjoined by both the District Court and the Court of Appeals (Petition for Certiorari pp. 12 and 13).

The statements on pages 5 and 7 of the petition for writ of certiorari would indicate that National Bank of Detroit had unconditionally determined on January 20, 1956 to establish a branch in Troy and that on March 19, 1956 the Comptroller had unconditionally approved its application for such a branch, and that as fast as possible thereafter National Bank of Detroit had proceeded to acquire a site, to erect a building and otherwise move as rapidly as possible to place the branch in operation and at the last moment was prevented from doing so by the temporary restraining order and subsequent injunction issued in this case. The facts, however, are otherwise.

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[1] Pet. p. 2, n. 2, p. 7 and p. 21, n. 20.

The controlling motive of National Bank of Detroit for the establishment of a branch in Troy was the possible merger of certain other banks into The Detroit Bank which was the largest competitor of National Bank of Detroit.[2] To insure protection of its competitive position with The Detroit Bank if the contemplated merger should take place and in order to avoid the effect of the second proviso of Section 34 of the Michigan Financial Institutions Act if Wayne Oakland Bank should commence operation of a branch in Troy, National Bank of Detroit on January 20, 1956 applied to the Comptroller for approval of its application to establish a branch in Troy (J.A. 42a-44a, 61a-62a). On February 23, 1956, National Bank of Detroit wrote the Comptroller a letter stating that in view of the Comptroller's indicated reluctance to approve the application because of the effect such branch might have on the Birmingham National Bank if the contemplated merger was not accomplished, National Bank of Detroit agreed that if would not open the Troy branch unless the merger was completed. (J.A. 84a-85a). The Comptroller on March 19, 1956 wrote National Bank of Detroit that "we have approved your application for permission to establish" the Troy branch but finishing with the statement that the branch should not open until the Comptroller's certificate has been issued (J.A. 92a).

[2] National Bank of Detroit then had total resources of nearly $2,000,000,000. After the merger The Detroit Bank and Trust Company had total resources of slightly over $1,000,000,000 and Wayne Oakland Bank had total resources of $84,028,096 (J.A. 49a). National Bank of Detroit had 55 branches, 22 of which were outside branches. All other Detroit banks had a total of 24 outside branches. Wayne Oakland Bank had 6 branches, 4 of which were outside branches (J.A. 40a, 49a).

Prior to April 2, 1956, the day on which Wayne Oakland Bank commenced operation of its Troy branch, National Bank of Detroit took no steps in connection with its proposed Troy branch except to obtain options on some vacant land which it purchased in April 1956 after authority therefor was given the officers by the bank's executive committee on April 12, 1956 (J.A. 45a, 95a). On April 11, 1956 and again in June of 1956 National Bank of Detroit informed Wayne Oakland Bank that the Troy branch of National Bank of Detroit would not open unless the merger was consummated (J.A. 47a 48a). While National Bank of Detroit, after April 2, 1956, took other steps to enable it to place the Troy branch in operation if the merger should be consummated, in so doing it was careful until the merger was a certainty that it not become too much involved in expenditures which would prove useless or which could not be recovered.

In June of 1956, the Boards of Directors of the banks involved in the proposed merger adopted the merger agreement and gave notice of stockholders' meetings to be held August 21, 1956 to ratify the merger (J.A. 47a). Prior to that time National Bank of Detroit had confined its activities to the acquiring of some vacant land, the grading of the site and the preparation of some plans for the building. On July 26, 1956, more than a month after the directors' meetings of the banks involved in the merger was held, National Bank of Detroit let a contract for the construction of the building (J.A. 45a), but the building was not actually commenced or a permit obtained therefor until August 24, 1956 (J.A. 46a), three days after the merger agreement had been approved by the stockholders of the constituent banks (J.A. 47a) and seven days after the filing of this suit (J.A. 1a). The

minutes of the meetings authorizing these expenditures show that the Executive Committee of National Bank of Detroit was careful to limit the authority of its officers in this matter so that the bank would not become involved in substantial expenditures which might prove useless or which could not be recovered if the bank did not proceed with the branch (J.A. 62a, 94a and 96a), and the construction contract was not authorized until July 26, 1956 (J.A. 96a-97a).

It was on these facts that both courts below held that Petitioner National Bank of Detroit had not established a branch in Troy prior to April 2, 1956, and that it could not do so after that date because the Troy branch of Wayne Oakland Bank was then in operation.

The petition for certiorari does not present as a reason for issuing the writ the question of whether National Bank of Detroit had established a branch prior to April 2, 1956, but contents itself with contending that the federal banking law does not incorporate the portion of the Michigan statute providing that no state bank may establish an outside branch[3] in a city in which there is then in operation another bank, state or national, or a branch thereof.

SUMMARY OF ARGUMENT

1. The applicability of the proviso of the Michigan Act to National banks.

(a) The question is not one of general importance calling for a decision of this Court. The decision is the first to involve 12 U.S.C. 36(c) on this point since

[3] The term "inside branch" as used in this brief refers to a branch of a bank, state or national, in the same city in which the main office of the bank is situated. The term "outside branch" refers to a branch located outside the city in which the main office of the bank is situated.

its enactment twenty-five years ago. Although Petitioner asserts it will create serious administrative difficulties for the Federal Government, the Comptroller, a defendant below, has not deemed it necessary to seek a review. A decision by this Court will not determine the effect of the branch banking statutes of 36 states and territories on branch banking by national banks, but can at most decide the effect of statutes of 8 states other than Michigan. The correctness of the decision below is demonstrated by the statements and actions of Petitioner and the Comptroller in this very matter.

(b) The decision is correct. Congress intended that a national bank should be permitted to establish a branch only at such points as it could if it were a state bank and to have no advantage in this respect over state banks. If the proviso is held inapplicable to national banks they would have a great advantage over state banks, destroying any equality of competitive opportunity, thus thwarting the purpose of Congress. The proviso is a "restriction as to location" to which Congress specifically subjected national banks. Neither the opinion of the Wisconsin Attorney General nor that of the Michigan Attorney General is authority to the contrary.

2. The right to sue. The decision in this case does not conflict with any decision of this Court or a Court of Appeals. Plaintiff had under the law an absolute right to be free from the competition of Petitioner's proposed Troy branch. Such right, coupled with irreparable injury, as here, entitled the holder of such right to enjoin the unlawful competition. Many decisions establish that right, including those cases with which Petitioner claims the decision in this case conflicts.

ARGUMENT

I

THE COURT BELOW DID NOT DECIDE ERRONEOUSLY AN IMPORTANT QUESTION WHICH SHOULD BE DECIDED BY THIS COURT

A. The Decision Below Does Not Involve "an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court"

Section 36(c) of the National Bank Act has been in force in substantially its present form since 1933. Yet, as petitioner states (p. 9), the decision below is the first decision by a Court of Appeals construing that section. Such lack of controversy over 25 years scarcely suggests a question of "utmost importance."

Although the judgment below enjoined both the Comptroller of the Currency and the National Bank of Detroit, the Comptroller, who is charged with the administration of this Act, has not petitioned for a writ of certiorari, and his counsel, the Solicitor General of the United States, has advised this Court that he does not desire to file any brief stating the Comptroller's views to this Court. Consequently, it has been left to the National Bank of Detroit to maintain here that an important question has been raised. In so doing, it has urged that the decision below will create administrative difficulties, real or fancied, in the Comptroller's administration of the Act which, if valid, would be of much more concern to the Comptroller than to the National Bank of Detroit.

Petitioner claims that the issue is important because thirty-six states and territories permit branch banking (Petition, pp. 13-14, Appendix C). The decision in this case can, at most, determine the effect of statutes in only eight other states[4] having statutes similar to

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[4] Idaho, Indiana, Iowa, Kentucky, Massachusetts, New Mexico, New York, South Dakota.

the Michigan Act which contains an absolute prohibition against the establishment of an outside branch in any city in which there is a bank or a branch. The decision will not determine the effect of statutes in the states in which the alleged difficulties will arise. The statutes of those states, such as Wisconsin (discussed *infra*, page 23) provide that the point at which a branch may be established is to be designated by a state official based on his determination of need. Such statutes present an entirely different question to which the decision in this case will provide no answer.

Both Petitioner and the Comptroller contended in the Court of Appeals, as Petitioner is contending here, that the second proviso to the Michigan Act is not applicable to national banks. That proviso is as follows:

> "Provided further, That no such branch shall be established in a city or village in which a state or national bank or branch thereof is then in operation:" (C.L. 1948, § 487.34)

This contention is directly contrary to the prior statements and actions of both of them in connection with this very matter.

The applicability of this proviso as a bar to the establishment by Petitioner of a branch in Troy after the commencement of operations of the Troy branch of Wayne Oakland Bank, was not only asserted by both Petitioner and the Comptroller many times but was the reason given by both of them for "expediting" the investigation of the application of Petitioner for permission to establish a branch in Troy, and was used by both of them as an excuse for omitting two important steps customarily taken in the investigation of

such applications—the notification of the Michigan Commissioner of the filing of the application, and the communication with potentially competing banks to ascertain what effect the establishment of such a branch would have on them.

Typical of their statements and actions are the following statements in a memorandum, produced from the files of the Comptroller, recording a conference between the Comptroller and certain of his subordinates and officers of Petitioner on February 3, 1956, with reference to the application of Petitioner to establish a branch in Troy:

> "Due to the provisions of the Michigan statute limiting the establishment of branches, once a branch operation is commenced in Troy, no other outside bank could establish a branch there. Bank's counsel advises that prior to that time, however, there is no legal obstacle to the granting of permission to establish a branch." (J.A. 105a)
>
> * * *
>
> "The visiting gentlemen presented formal application for the * * * branches, and requested that, regarding the one in Troy, that it be kept on a confidential basis and that we do not notify Commissioner Eveland, or contact any of the competing banks. The reason for the request was that the visitors were fearful of a leak through the State Commissioner's office that this bank was after a branch, which would cause the Wayne-Oakland Bank to hasten to open in temporary quarters in an attempt to legally block this application.
>
> "The visitors were informed that not to notify Commissioner Eveland of this application would be a deviation of our present working arrangement with his office. Mr. Gidney said that we would have an Examiner make this investigation to determine the need for a branch, and would instruct

him to keep the investigation on a confidential basis, not contacting any competing or neighboring banks. It was understood that we would not contact Commissioner Eveland's office at this time" (J.A. 106a)

To the same effect are certain letters, minutes and other matter, excerpts from which are set forth in Appendix B, *infra*.

The Comptroller testified on deposition that contrary to the usual practice of his office, the investigation of the application of Petitioner with respect to the Troy branch was conducted in a confidential manner for fear that some state bank might get into operation in Troy first (J.A. 131a-132a).

On October 18, 1956, at the hearing in the District Court for the District of Columbia on the Motion for Preliminary Injunction in this case, the attorney for the Comptroller informed the Court that the second proviso of Section 34 of the Michigan Act was "the crux of this case" and said that Plaintiff's statement that the law does not authorize the establishment of a branch of a national bank if a branch of a state bank is already in operation was "entirely correct." He said his disagreement with Plaintiff's counsel was over the meaning of the word "established." The proceedings of October 18, 1956 have not been printed in full in the Joint Appendix. An excerpt from them is set forth in Appendix II, pp. 4b to 5b of Brief for Plaintiff and Appellee filed in the Court of Appeals (R. 226a-227a).

We do not, of course, claim that Petitioner is legally barred from changing its position on the effect of this proviso. However, such a complete about-face on this point in connection with this very matter makes

much less impressive than they would otherwise be. Petitioner's present arguments that the decisions of the Courts below were erroneous and that the error calls for correction by this Court.

B. The Decision of the Court Below Is Correct

Petitioner contends that the second proviso of Section 34 of the Michigan Financial Institutions Act (M.S.A. 23.762), which provides that an outside branch of a state bank shall not be established in a city in which a state or national bank or branch thereof is then in operation, does not apply to the establishment of an outside branch by a national bank. Wayne Oakland Bank contends that the proviso plainly applies to national banks because of 12 U.S.C. 36 which provides that a national banking association may establish and operate outside branches:

> "at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks."

In upholding Wayne Oakland Bank's contention that the Michigan proviso was applicable to national banks, the Court of Appeals in its opinion denying a rehearing said (R. 285a-286a):

> "The history of federal legislation regarding branch banking and the statutes applying thereto leaves a clear and definite impression that Congress intended, with respect to the location of branches, that a national bank should have no greater rights than it would if it were a state bank, and that a

national bank was to be permitted to establish and operate a branch in a state only at such a point as it could, by express provisions of a state statute, establish and operate a branch if it were then a state bank."

Wayne Oakland Bank asserts that this is a correct statement.

History of Branch Banking

The history of the Federal legislation dealing with branches of national banks shows several things. It shows that Congress intended its grants of power to be strictly construed and not extended by forced construction or implication; it shows that Congress intended that national banks were not to have power to establish and operate branches that was not clearly expressed in the legislation; and it shows most clearly that Congress intended that national banks should never have any advantage in this respect over state banks.

An important part of this history consists of the annual reports of the Comptroller of the Currency to Congress during the ten years preceding 1932. In these reports the Comptroller took the position that branches for national banks were not merely desirable but were essential if the country was to have adequate banking facilities and if the national banking system was to survive.[5] He even expressed fears for the continuance of the Federal Reserve System if this disadvantage on national banks was not removed. Commencing with 1929 he urged that such branches be permitted anywhere in the trade area of the bank regardless of state lines. He supported his arguments

[5] An analysis of these reports is contained in Appendix C, *infra*.

with impressive arrays of facts. However, during all of this period Congress stood fast against what it considered to be an invasion of the rights of banks in the smaller communities and the only fruit born by these efforts of the Comptroller during this period was the passage by Congress in 1927 of an act permitting inside branches subject to certain limitations.

In 1932, Senate Bill 4412 embodying these recommendations of the Comptroller was introduced by Senator Glass.

Present subdivision (*c*) of 12 U.S.C. 36 treats inside branches and outside branches separately. Senate Bill 4412, as originally introduced and as recommended by a majority of the Senate Committee, did not do so. It provided for an amendment of this subsection so as to permit a national bank to establish and operate new branches

> "within the limits of the city, town, or village, or *at any point within the State* in which said association is situated: *Provided,* That, if by reason of the proximity of such an association to a State boundary line, the ordinary and usual business of such association is found to extend into an adjacent State, the Federal Reserve Board may permit the establishment of a branch or branches by such association *in an adjacent State* but not beyond a distance of fifty miles from the place where the parent bank is located." (Emphasis supplied)

Senator Bratton offered an amendment to limit branches to points within the state, and then only "if such establishment and operation are at the time permitted to state banks by the law of the state in question." The effect of Senator Bratton's amendment would merely have been to make applicable to outside

branches the provisions of the 1927 Act with respect to inside branches. Senator Wheeler objected to the use of the word "permitted," pointing out that if the law of a state was silent on the subject, national banks might be permitted to have branches in that state and that he wanted a provision that "branch banks shall not be permitted in a state unless the Legislature or the people themselves, through an initiative, actually by law say that they shall be permitted there." (Cong. Rec. V. 76, p. 1997) Senator Bratton's proposed amendment was then changed so that such establishment would be permitted "if such establishment and operation are at the time expressly authorized to State banks by the law of the state in question and subject to the restrictions as to location imposed by the law of the State on State banks." This applied to both inside and outside branches. The amendment to the bill was adopted and the bill in that form passed the Senate, but was not acted on by the House. (Cong. Rec. V. 76, pp. 2205, 2208, 2517)

The 1933 legislation originated in the House of Representatives in the form of House Bill 5661. That bill proposed no change in the then existing law (which permitted only inside branches). When that bill reached the Senate, Senate Bill 1631 was substituted for House Bill 5661. Senate Bill 1631 contained the same provision with respect to branches that had been adopted by the Senate in 1932 by Senate Bill 4412 as amended at the insistence of Senators Bratton and Wheeler. Section 22 of Senate Bill 1631 read in part as follows:

> "Sec. 22. Paragraph (e) of Section 5155 of the Revised Statutes, as amended, is amended to read as follows:

> "'(c) A national banking association may with the approval of the Comptroller of the Currency establish and operate new branches within the limits of the city, town or village, or at any point within the State in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question and subject to the restrictions as to location imposed by the law of the State on State banks. * * * '"

After passage by the Senate of Senate Bill 1631 in that form the bill went to Conference Committee and the Committee rewrote this subsection. In doing so the Committee separated the provision governing inside branches from that governing outside branches. No material change was made in this subsection with respect to inside branches as it had been enacted in 1927 except to change the word "permitted" to "expressly authorized." As to outside branches, however, the bill as changed by the Committee provided that outside branches were to be permitted,

> "if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks."

In that form the bill passed both Houses and this language has not been changed since.

The difficulty experienced in getting Congress, first to permit any branches, and later to permit outside branches, and the language used by Congress and the extreme care taken in the adoption of that language, evidence clearly an intention of Congress to permit

branches, and particularly outside branches, only to a very limited extent—only to the same extent that such branches are permitted by state statute to state banks; and to make doubly certain that national banks should have no advantage over state banks in this respect it made national banks "subject to the restrictions as to location imposed by the law of the State on State banks."

Equality of Competition

Petitioner's argument is based in a large part on its statement that the "acknowledged legislative purpose" of the National Bank Act was "to place national and State banks on a competitive equality" (p. 17, Petition for Certiorari). As a general statement this is true, but like all generalizations it must be applied with care and discrimination.

Petitioner's contention would not provide the competitive equality which it asserts Congress intended to establish. It would do exactly the opposite. If the second proviso of the Michigan Act is not applicable to national banks, national banks will enjoy a tremendous competitive advantage in the right to establish branches, because it is not contended and cannot be contended that that proviso is not applicable to state banks.

There are more than twenty cities in Wayne, Oakland and Macomb counties, most of them within twenty-five miles of downtown Detroit, where the main office of National Bank of Detroit is located. If the proviso to the Michigan Act is not applicable to national banks any national bank in this area may establish either an inside branch or an outside branch in any one of these cities regardless of the presence there of the main office

or a branch of either a state or a national bank. But no state bank may establish an outside branch in any one of these cities in which there is either the main office or a branch of either a national bank or another state bank.

Petitioner asserts the right to establish a branch in the City of Troy regardless of the presence there of a branch of Wayne Oakland Bank, but it cannot dispute the fact that because of this very proviso Wayne Oakland Bank cannot establish a branch in any of the cities in the area in which Petitioner has a branch. To carry the matter one step further, if the proviso is not applicable to national banks, Petitioner (and any other national bank in the area) can establish a branch in the relatively small suburban city of Royal Oak where the main office of Wayne Oakland Bank is located, but, clearly, Wayne Oakland Bank cannot establish a branch in Detroit with its two million population even though the Detroit city limits are less than three miles from the main office of Wayne Oakland Bank. This demonstrates quite clearly that the legislative purpose of Congress to place national and state banks on a competitive equality will be completely destroyed if the second proviso of the Michigan Act is held inapplicable to national banks.

It is true that the proviso creates a monopoly, albeit a very limited one. Any statutory designation of the points at which banks may establish branches and any restrictions as to the location of such branches tend to restrain competition and create some monopoly. This is merely a monopoly of the right to establish outside branches in a city. It is not a monopoly of the banking business of the community. The prior establishment of an outside branch in a city does not prevent

the establishment of a main office of a bank in that city. Moreover, the customers of a bank need not and do not respect municipal boundaries in selecting their banks.

The monopoly created by this law serves a real purpose. As the reports of the Comptroller show, many outlying communities cannot support a bank. Nevertheless adequate and safe banking facilities are necessary for the development of these communities. Often the only way in which such communities can have these banking facilities is by the establishment of a branch of a bank from some other community. Such branches frequently operate at a loss for a considerable period of time (J.A. 187a). To induce banks to establish branches in such communities and suffer such loss the Legislature has assured any bank doing so that after it has assisted in developing the community to a point where the banking business is profitable, some other bank will not be permitted to come in and, by the establishment of an outside branch, participate in the cream that has resulted from the husbandry of the original bank during the unprofitable period. This is not done just for the benefit of the bank but also as a means of obtaining banking facilities which might otherwise be unobtainable. It is precisely for this reason that public utilities are frequently given monopolies and banks are of somewhat the same character. See *Little* v. *American State Bank*, 263 Mich. 645, 648.

Restrictions as to Location

Petitioner urges that the second proviso of Section 34 of the Michigan Act is not applicable to national banks because it does not create a "restriction as to

location." Petitioner states (p. 10) that Congress has specified only two respects in which the establishment and operation of a branch by a national bank is to be *limited* by state law. From this it argues that Wayne Oakland Bank must stand or fall on the phrase "restrictions as to location" in 12 U.S.C. 36(c). We think this overlooks the meaning and effect of this entire section.

A national bank has no inherent right to establish a branch.[6] Its right to do so must be found in some Act of Congress. That right is contained in 12 U.S.C. 36(c). But in determining the extent of that right consideration must be given both to the positive and the negative expressions—to the language of the grant as well as to specifically expressed limitations. Stripped of language not important to this part of the present controversy, the right of a national bank to establish an outside branch is contained in the following language of 12 U.S.C. 36(c):

> "(c) A national banking association may * * * establish and operate new branches: * * * (2) at any point within the State * * *, if *such* establishment and operation are at the time authorized to State Banks by the Statute law of the State * * *." (Emphasis supplied.)

Read literally this language grants the right to a national bank to establish an outside branch only in a state in which state statute authorizes state banks to establish branches *at any point within the state*.[7] Read

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[6] *St. Louis First National Bank* v. *Missouri*, 263 U.S. 640.

[7] The statement in the petition (pp. 12-13, n. 9) that the authorization clause permits the establishment of a branch of a national bank at any point within the state if the "establishment of branches" is at the time authorized to state banks, is obviously

literally this language would not permit Petitioner to establish *any* outside branch because Michigan statute law does not permit state banks to establish branches *at any point within the state*. We do not contend that the language should be so narrowly construed. We believe that what Congress meant by this language was that a national bank may establish and operate an outside branch at any point within the state at which such establishment and operation would then be authorized by state statute to a state bank. Petitioner contends (p. 12) that such a construction makes the "restrictions as to location" clause surplusage. Perhaps so, but this would not be the first instance in which Congress has used what might be unnecessary language to make certain that its intention would not be thwarted. But surplusage or not, and without, but certainly with, the "restrictions as to location" clause,

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incorrect. Similar expressions appear elsewhere in the petition. These apparently are based on a contention that the words "such establishment and operation" relate to "new branches" rather than to "at any point within the State." Such a contention is shown to be unsound by an examination of the provision with respect to inside branches where the same words ("such establishment and operation") are used. That provision reads as follows:

> "(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question;"

Obviously the words "such establishment and operation" in the provision with respect to inside branches relates to the right to establish branches "within the limits of the city, town or village in which such association is situated." Equally obviously the words "such establishment and operation" in subdivision (2) dealing with outside branches refers to the language "at any point within the state."

we believe the construction we have given expresses precisely what Congress meant.

The history of this legislation shows clearly that in this matter Congress did not intend national banks to have *any* advantage over state banks. To make certain of this Congress used both affirmative and negative language. It thus insured what Petitioner calls "competitive equality." But only by the construction of this entire language as we have contended can this "competitive equality" be accomplished.

We take up, however, Petitioner's argument that the second proviso to Section 34 of the Michigan Act is not a "restriction as to location."

Petitioner's argument is that the proviso does not create a restriction on location but is merely a limitation on the number of banks which may establish branches in a particular community.

If the proviso had read:

> "Provided further, That no such branch shall be established within a distance of two miles of a state or national bank or branch thereof"

we do not believe it could be successfully asserted that this was not a restriction as to location imposed by law on state banks. There would seem to be no reason why the Legislature could not use municipal boundaries instead of miles or any other determinant in establishing a permitted or proscribed area for outside branches. In defining the "point" within the state at which a state bank may establish an outside branch the Legislature has said that it must be within a city or village in which there is no other bank, state or national, or branch thereof. It has prohibited the establishment

of an outside branch of a state bank in any city or village in which a state or national bank or branch thereof, is then in operation. Clearly, this falls within both the permissive and restrictive clauses of 12 U.S.C. 36(c).

Petitoner relies on an opinion of the Wisconsin Attorney General dated March 19, 1947. (For entire opinion see R. pp. 210a-222a). The question involved in the Wisconsin Attorney General's opinion was not whether a state bank could have established a paying and receiving station at that particular point but whether a requirement that the need for banking facilities at that point be determined by the State Commission was a "restriction as to location." This is clearly shown by the last portion of the opinion where he pointed out that the national bank was complying with all other requirements of Wisconsin law and the regulations of the State Banking Commission, including the requirement that the paying and receiving station be not closer than three miles to an existing bank.' (R. 221a)

Obviously the requirement that a state bank not establish a paying and receiving station except at a point which the State Commission determines not to be adequately served with banking facilities, is not a restriction as to location "imposed by the *law* of the

'While the Wisconsin Attorney General used language which standing alone might support the contention that if the state law permits the establishment of "branches" a national bank may establish a branch at any point within the state, this was not the controlling thought behind the Wisconsin Attorney General's opinion. It is obvious that if the national bank there involved had been a state bank it could have established a paying and receiving station at this point if it had received the approval of the Wisconsin State Banking Commission.

State." The restriction comes about as a result of the discretionary action of the Wisconsin Commission. That is not the type of restriction which Congress meant.[2]

The Wisconsin Attorney General relied heavily on *Rushton* v. *Michigan National Bank*, 298 Mich. 417. In that case the Michigan Court was dealing with precisely the same type of situation. In the *Rushton* case the Attorney General of the State of Michigan filed suit to determine under what authority the Michigan National Bank operated branches in various cities and acted in fiduciary capacities in those cities. The Comptroller of the Currency had authorized the bank to establish and operate the branches in question. The Michigan Attorney General claimed that for a national bank to establish an outside branch in the state it must appear that state law gave an unqualified or unconditional right to state banks to do so, and that since Section 34 of the Michigan Act only permitted a state bank to do so "upon obtaining permission in writing from the Commission" a national bank might not operate a branch without complying with this provision of the Michigan statute.

The Michigan Supreme Court, after quoting at length from many decisions to show that national banks are not subject to the provisions of state law which

[2] As pointed out in the Petition for Certiorari (p. 13) the only "restriction as to location" contained in the statutes of many states is one based solely on the discretion of a state official. Since the second proviso of Section 34 of the Michigan Act is not of this character the holding of the court below is not to "sweep within the federal 'restrictions as to location' clause a myriad of state law conditions having no relation to 'location.'" (Pet. p. 14.)

give state banking commissions administrative control over state banks, said (p. 437):

> "The conclusion reached after examining the foregoing authorities is that the approval of the comptroller of the currency alone is required for the establishment and operation of branch banks of a national banking institution within the State of Michigan and that such branch banks may be established and operated to the same extent and subject to the same limitations as are State banks."

Wayne Oakland Bank is not relying in this case on any provision of the Michigan Act which vests discretionary power in the hands of the Michigan Commission. Nor is it relying on any restriction as to location which the Michigan law places within the administrative discretion of the Michigan Commission. While Section 34 of the Michigan Act permits a state bank to establish an outside branch only with the permission of the Commission, Wayne Oakland Bank does not contend that such permission is necessary for a national bank. What it does contend is that Section 34 of the Michigan Act does not permit a state bank to establish an outside branch in a city in which a bank or branch thereof is in operation even if the Michigan Commission determines that there is a need for such facilities at that point, and that therefore a national bank may not establish an outside branch in such a city even though the permission of the Michigan Commission is not required of a national bank in any case.

One further point as to the Petitioner's contention that the second proviso of Section 34 of the Michigan Act (by the use of municipal boundaries as location points) is not a "restriction as to location." Congress

has done exactly the same thing in 12 U.S.C. 36(c)—once in subdivision (1) permitting the establishment of inside branches and again in subdivision (2) by permitting the establishment of "seasonal agencies" "if no bank is located and doing business in the place where the proposed agency is to be located." We doubt very much that the Petitioner or anyone else would dispute that the language quoted is a "restriction as to location," yet the substance of that language is identical with the substance of the second proviso of Section 34 of the Michigan Act, which was adopted in its present form ten years after Congress added the "seasonal agency" amendment in 1935.

Opinion 1370 of Michigan Attorney General

The implication in footnote 20 on page 21 of the Petition that the Michigan Attorney General, in Opinion 1370 (J.A. 69a), held that the proviso to the Michigan Act is not applicable to national banks is entirely incorrect. The opinion of the Attorney General was intended to be an opinion on the question of when a branch, state or national, was deemed to be "established" within the meaning of that proviso, as is clearly shown by the following language of the opinion:

> "The establishment of the proposed national branch bank is permissible under this act, there being no branch bank 'in operation' at this time in the locality in question." (J.A. 72a)

It is also clearly shown by the request for the opinion (J.A. 197a-198a) and by the Opinion of the Attorney General of February 24, 1953 (J.A. 200a-203a). Both of these opinions were relied on by Petitioner and the Comptroller in the courts below to support their contention that Petitioner had "established" a branch

in Troy prior to the time Wayne Oakland Bank commenced operation of its Troy branch (a contention with which both courts below disagreed). But no claim has ever been advanced that the Attorney General in Opinion 1370 held that the proviso was not applicable to national banks.

It is respectfully submitted that the second proviso of Section 34 of the Michigan Act is applicable to national banks, and that under it and 12 U.S.C. 36 a national bank is prohibited from establishing an outside branch in Michigan in any city in which a state or national bank then has its main office or has an outside branch in operation.

II

THE HOLDING OF THE COURTS BELOW THAT RESPONDENT STATE BANK HAD STANDING TO MAINTAIN THIS ACTION DOES NOT CONFLICT WITH AN APPLICABLE DECISION OF THIS COURT AND THE RULING OF ANOTHER COURT OF APPEALS

In determining whether or not Wayne Oakland Bank had the right to bring this suit it must be borne in mind that this case is not (as so many of the cases before this court have been) a suit in which the right is sought to enjoin claimed illegal action of a Government official on the ground that such action will result in injurious but *lawful* competition. The essence of the complaint in this case is that the establishment by National Bank of Detroit of a branch in Troy after April 2, 1956, the date on which Wayne Oakland Bank commenced operation of its Troy branch, would in and of itself be illegal and would be in violation of Wayne Oakland Bank's "exclusive right to operate a branch bank in the City of Troy" (J.A. 13a).

Since both of the lower courts held that the competition itself would be unlawful and that such competition would result in irreparable injury to Plaintiff both courts enjoined the competition. Both courts likewise enjoined the Comptroller from issuing his certificate by which he would place the stamp of his approval on the illegal competition that would result.

There are two distinct lines of cases with respect to the standing of a litigant to maintain suit to enjoin competition. Petitioner here has confused these two lines of decisions, and has attempted to rely on that line which is inapplicable to the facts.

One line of decisions stands for the proposition that where the litigant possesses a legal right conferred by statute to be free from competition, it has standing to sue where that right is threatened with invasion. Typical of this line of cases are the decisions of this Court in *Walla Walla City* v. *Walla Walla Water Company*, 172 U.S. 1; *Frost* v. *Corporation Commission*, 278 U.S. 515; *Chicago* v. *A. T. & S. F. Railway Company*, 357 U.S. 77, decided June 16, 1958. See also *New State Ice Co.* v. *Liebmann*, 285 U.S. 262. Compare *Columbia Broadcasting System* v. *United States*, 316 U.S. 407; *Stark* v. *Wickard*, 321 U.S. 288.

The second line of decisions stands for the proposition that a litigant who does not possess a present exclusive right to be free from competition has no standing to sue to restrain either private or public competition on the ground that such competition is either an *ultra vires* act (in the case of a private corporation), or an invalid act beyond the legal powers of the governmental instrumentality. Representative of this line

are the following decisions: *Alabama Power Company* v. *Ickes*, 302 U.S. 464; *Duke Power Company* v. *Greenwood County*, 91 F. 2d 665 (CCA 4), affirmed, 302 U.S. 485; *Tennessee Electric Power Company* v. *Tennessee Valley Authority*, 306 U.S. 118; *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924 (D.C. Cir. 1955), *cert. den.* 350 U.S. 884.

Both of these lines of cases adopt exactly the same principle of law. In the first line of cases plaintiffs were held entitled to sue because the challenged *competition* was *unlawful*. In the second line of cases plaintiffs were held not entitled to sue because the challenged *competition* was *lawful*. The two lines result from the application of the same principle of law to different factual situations.

The right of one who will be injured by *unlawful* competition to enjoin that competition is clear.

Frost v. *Corporation Commission*, 278 U.S. 515, involved a statute of Oklahoma which declared the business of operating a cotton gin to be a public utility, and which prohibited such operation without a license from the Corporation Commission. The statute, as originally enacted, required a showing of public convenience and necessity as a condition for the granting of a license. Plaintiff after making such a showing obtained a license to operate a gin. Thereafter, by amendment to the statute, it was provided that certain cooperatives could obtain licenses without a showing of public convenience and necessity. Such a cooperative applied to the Corporation Commission for a license to operate a gin. It did not make any showing of public convenience and necessity. Plaintiff protested to the Commission the granting of the license without

such a showing, but the Commission held that the amendment to the statute made it mandatory to grant the license without regard to necessity. Plaintiff filed suit to enjoin the Commission from issuing the license and to enjoin the cooperative from the establishment of the gin on the ground that the amendment to the statute was invalid as contravening the due process and equal protection clauses of the Fourteenth Amendment. In holding that plaintiff was entitled to an injunction as prayed, this Court said (p. 521):

> "Appellant, having complied with all the provisions of the statute, acquired a right to operate a gin in the city of Durant by valid grant from the state acting through the corporation commission. While the right thus acquired does not preclude the state from making similar valid grants to others, it is, nevertheless, exclusive against any person attempting to operate a gin without obtaining a permit or, what amounts to the same thing, against one who attempts to do so under a void permit; in either of which events the owner may resort to a court of equity to restrain the illegal operation upon the ground that such operation is an injurious invasion of his property rights. 6 *Pom. Eq. Jur.*, 3d ed. (2 Eq. Rem.) §§ 583, 584; *People's Transit Co.* v. *Henshaw* (C.C.A. 8th), 20 F. (2d) 87, 90; *Bartlesville Electric Light & P. Co.* v. *Bartlesville Interurban R. Co.*, 26 Okla. 453, 29 L.R.A. (N.S.) 77, 109 Pac. 228; *Patterson* v. *Wollman*, 5 N.D. 608, 611, 35 L.R.A. 536, 67 N.W. 1040; *Millville Gaslight Co.* v. *Vineland Light & P. Co.*, 72 N.J. Eq. 305, 307, 65 Atl. 504. The injury threatened by such an invasion is the impairment of the owner's business, for which there is no adequate remedy at law."

New State Ice Co. v. *Liebmann*, 285 U.S. 262, involved a statute that prohibited carrying on the ice

business without first securing a license to be issued only on a showing of public convenience and necessity. Plaintiff had obtained such a license. Defendant was carrying on such business without a license. In passing on Plaintiff's right to an injunction, this Court said (p. 273):

> "* * * but the question here is whether the business is so charged with a public use as to justify the particular restriction above stated. If this legislative restriction be within the constitutional power of the state legislature, it follows that the license or permit, issued to appellant, constitutes a franchise, to which a court of equity will afford protection against one who seeks to carry on the same business without obtaining from the commission a license or permit to do so. *Frost v. Corporation Commission,* 278 U.S. 515, 519-521."

In *Alabama Power Company* v. *Ickes*, 302 U.S. 464, plaintiffs, various power companies operating electricity distribution systems, sought to enjoin the Federal Emergency Administrator of Public Works from giving financial assistance to various municipalities in the construction of electric plants which the municipalities would then operate in competition with plaintiffs. Plaintiffs claimed that the act authorizing such assistance was unconstitutional and that the Administrator was exceeding the authority granted him by the act. One of the grounds on which plaintiffs in that case claimed standing to sue was the injury, perhaps the destruction, of their business that would result from the competition of the municipalities. In that case the Court held that plaintiffs did not have standing to maintain the suit, but it is clear from a reading of the opinion that the reason the Court reached that conclusion was because of a finding by the Court that

the competition from the municipalities would be entirely lawful. The Court's opinion on this point is well summarized in one sentence on page 478, as follows:

> "In short, the case for petitioner comes down to the contention that consummation of the loan-and-grant agreements should be enjoined on the sole and detached ground that the administrator lacks constitutional and statutory authority to make them, and that the resulting moneys, which the municipalities have clear authority to take, will be used by the municipalities in *lawful*, albeit destructive, competition with petitioner." (Emphasis supplied.)

That the Court in the *Alabama Power* case recognized that that rule would not be applicable to a case where the competition itself would be unlawful, is clearly shown by the paragraph of the Court's opinion in which the Court distinguished the *Alabama Power* case from *Frost* v. *Corporation Commission*, *supra*, on the ground that in the *Frost* case the threatened competition was unlawful, saying (pp. 484 and 485):

> "*Frost* v. *Corporation Commission*, 278 U.S. 515, 73 L. ed. 483, 49 S. Ct. 235, relied upon by petitioner, presents an altogether different situation. Appellant there owned a cotton-ginning business in the city of Durant, Oklahoma, for the operation of which he had a license from the corporation commission. The law of Oklahoma provided that no gin should be operated without a license from the commission, which could be obtained only upon specified conditions. We held that such a license was a franchise constituting a property right within the protection of the Fourteenth Amendment; and that while the acquisition of the franchise did not preclude the state from making similar valid grants to others, it was exclusive against an attempt to operate a competing

gin without a permit or under a void permit. The Durant Co-operative Gin Company sought to obtain a permit from the commission which, for reasons stated in our opinion, we held would be void and a clear invasion of Frost's property rights. We concluded that a legal right of Frost to be free from such competition would be invaded by one not having a valid franchise to compete, and sustained Frost's right to an injunction *against the commission and the Durant company.* See *Corporation Commission* v. *Lowe*, 281 U.S. 431, 435, 74 L. ed. 945, 948, 50 S. Ct. 397. The difference between the *Frost* case and this is fundamental; for the competition contemplated there was *unlawful* while that of the municipalities contemplated here is entirely *lawful.*" (Emphasis supplied.)

See also *Greenwood County* v. *Duke Power Company* (CCA 4), 81 F. 2d 986, and *Duke Power Company* v. *Greenwood County* (CCA 4), 91 F. 2d 665, affirmed in 302 U.S. 485.

These cases and the principles followed in them have been completely ignored by Petitioner. Instead, Petitioner asserts that the holding of the lower courts that Plaintiff may maintain this action conflicts with the decision of this Court in *Tennessee Electric Power Company* v. *Tennessee Valley Authority*, 306 U.S. 118. In so contending Petitioner has seized on the following language in the majority opinion:

> "Whether competition between utilities shall be prohibited, regulated or forbidden is a matter of state policy. That policy is subject to authorization at the will of the legislature. The declaration of a specific policy creates no vested right to its maintenance in utilities then engaged in the business or thereafter embarking on it." 306 U.S. 141.

Petitioner attempts to read into the quoted language a holding that one who will be injured by competition,

the existence of which is prohibited by statute, may not sue to enjoin that competition if the statute can be changed. To put it in other words, they contend that one who has a monopoly created by an applicable statute may not sue to protect that monopoly even while the statute is in force if the legislative body which enacted the statute can, by amendment or repeal of the statute, modify or eliminate the monopoly which it has thus conferred. We do not think that the language of the *Tennessee Power* case should be so construed for the following reasons:

1. While the cases cited by this Court in support of the language quoted from the *Tennessee Power* decision support the statement made in that case, they do not support Petitioner's contention as to the meaning of that statement. These cases are *Wheeling & B. Bridge Co.* v. *Wheeling Bridge Co.*, 138 U.S. 287, and *Williams* v. *Wingo*, 177 U.S. 601. In both of these cases the Court held that in the absence of a provision in a statute binding it not to do so, a state could repeal or amend a statute creating a limited monopoly without violation of the contract clause of the Federal Constitution and that *after it had done so* the holder of such a limited monopoly could not challenge the right of the holder of another license granted by the state to infringe what had formerly been the limited monopoly.

2. Petitioner's contention advanced here was not argued or suggested in the briefs filed in this Court in the *Tennessee Power* case. The *Frost* case was distinguished on the ground that the injurious competition in the *Tennessee Power* case was lawful (citing *Alabama Power Company* v. *Ickes*, *supra*); and on the ground that the statute in the *Frost* case conferred a quasi-monopoly whereas the power com-

panies had no statutory monopoly, their "franchises" consisting merely of power to act as public utilities, which conferred no exclusive right, and their rights to use public streets which were not being violated. It was not claimed that the holder of a monopoly granted by a statute which is subject to change may not sue to protect that monopoly while the statute remains in effect.

3. If this Court in the *Tennessee Power* case meant what is contended by Petitioner, then the *Tennessee Power* case overruled *Frost* v. *Corporation Commission, supra, New State Ice Company* v. *Liebmann, supra*, and the basis for the decision of this Court (though not the result) in *Alabama Power Company* v. *Ickes*, 302 U.S. 464, which was decided by this Court only one year before the Court decided the *Tennessee Power* case. The Court in the *Tennessee Power* case specifically adopted the principles announced in the *Frost, Liebmann* and *Ickes* cases in the following language:

> "The appellants invoke the doctrine that one threatened with direct and special injury by the act of an agent of the government which, but for statutory authority for its performance, would be a violation of his legal rights, may challenge the validity of the statute in a suit against the agent. The principle is without application unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." 306 U.S. 137.

Not only is there nothing in the opinion of the *Tennessee Power* case which indicates that this Court in that case was overruling any of its prior decisions, the Court affirmatively stated that its decision was

based on prior decisions. Thus we find the statement that

> "The contention (that Tennessee Electric Power Company had the right to sue) is foreclosed *by prior decisions* that the damage consequent on competition, *otherwise lawful,* is in such circumstances damnum absque injuria, and will not support a cause of action or a right to sue." (Emphasis supplied) 306 U.S. 140,

citing in support of this statement, among others, *Alabama Electric Power Company* v. *Ickes, supra,* and *Greenwood County* v. *Duke Power Company,* 81 F. 2d 986, 997, and *Duke Power Company* v. *Greenwood County,* 91 F. 2d 665, 676. The Court was careful to distinguish the *Tennessee Power* case from the *Frost* case on another ground (306 U.S. 143) which shows quite clearly that the *Frost* case was not overlooked by this Court in handing down an opinion which it is claimed overruled the *Frost* case without saying so.

4. The language quoted from the *Tennessee Power* case was merely the introduction to the next paragraph of its opinion in which the Court pointed out that every state in which the Tennessee Valley Authority was then functioning had amended its statutes to exempt the Authority from the requirement of obtaining a certificate of convenience and necessity, thereby making the challenged competition entirely lawful. This is clearly shown by the following language earlier in the opinion:

> "The franchise to exist as a corporation, and to function as a public utility, in the absence of a specific charter contract on the subject, creates no right to be free of competition, and affords the corporation no legal cause of complaint by reason of the state's *subsequently* authorizing another to enter and operate in the same field." (Emphasis supplied) 306 U.S. 139.

5. As Petitioner has pointed out, this Court has recently considered substantially this same question in *Chicago v. A. T. & S. F. Railway Company*, 357 U.S. 77, decided June 16, 1958, in which this Court overruled the contention that Parmelee had no standing to review an adverse ruling of the lower court. Parmelee had been licensed to operate under a Chicago ordinance which, if valid, prohibited Transfer from operating in competition with Parmelee unless Transfer obtained a license. Certainly the ordinance could have been amended or repealed. Parmelee relied on *Frost v. Corporation Commission*. In disposing of this question this Court said:

> "Second. Parmelee has standing to secure review of the judgment below by appeal. It is enough, for purposes of standing, that we have an actual controversy before us in which Parmelee has a direct and substantial personal interest in the outcome. Undoubtedly it is affected adversely by Transfer's operation. Parmelee contends that this operation is prohibited by a valid city ordinance and asserts the right to be free from unlawful competition. Transfer, on the other hand, suggests that Parmelee has no standing because the city ordinance is invalid and Transfer's operation is lawful. It argues that a party has no right to complain about lawful competition, citing *Alabama Power Co. v. Ickes*, 302 U.S. 464, and *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118. We do not regard either of these cases as controlling here." (357 U.S. at 83.)

The decision of the District of Columbia Circuit in *Kansas City Power & Light Co. v. McKay*, *supra*, is a mere exemplification of this Court's decision in the *Tennessee* case, *supra*. The complainant had no present right conferred by statute to be free from competition, and therefore no standing to sue. In citing and

relying on the *Tennessee* case, the District of Columbia Circuit clearly stated (225 F. 2d 929):

> "It [this Court in the TVA case] rejected the contention that the competition which the Authority's program would provide was illegal, pointing out that the charters and franchises awarded to the public utility companies did not 'involve the grant of a monopoly or render competition illegal' ".

In the case at bar, however, Wayne Oakland Bank has a monopoly which protects it from competition by a national bank. That monopoly was created as against state banks by the second proviso of Section 31 of the Michigan Financial Institutions Act and was made applicable against national banks by 12 U.S.C. 36 (c). While these acts are in effect Wayne Oakland Bank is entitled to be free of the competition that would result from the establishment and operation in Troy of an outside branch of either a state or a national bank. In this respect Wayne Oakland Bank's position is even stronger than was the position of the Plaintiff in *Frost* v. *Corporation Commission* because the monopoly provided by these statutes is exclusive whereas the monopoly provided by the Oklahoma statute involved in the *Frost* case was exclusive only to a limited extent.

The statement on page 26 of the petition that "the essence of the complaint (in this case) is that the plaintiff will suffer competition from the action of administrative officials taken pursuant to statute" is not correct. The essence of Plaintiff's complaint in this case is that the establishment and operation by National Bank of Detroit of a branch in Troy will in and of itself be a direct violation of the exclusive monopoly to operate such a branch granted Wayne Oakland

Bank by the Federal law. This is precisely the type of complaint that was involved in the *Frost* case and in the Parmelee case, and in holding that Plaintiff was entitled to relief this Court in the *Frost* case enjoined both the operation of the gin by the Cooperative Company and the issuance of a certificate of convenience and necessity by the Oklahoma Corporation Commission. That is precisely the relief granted Wayne Oakland Bank by both of the lower courts in this case.

It is respectfully submitted that the decision of the Court of Appeals in this case is in conflict with neither the opinion of this Court in the *Tennessee Power* case nor of the Court of Appeals for the District of Columbia in the *Kansas City Power and Light* case and that the decision of the Court of Appeals in this case was correct.

CONCLUSION

WHEREFORE, the petition for a writ of certiorai should be denied.

Respectfully submitted,

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APPENDIX

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APPENDIX A

Regulations of the Comptroller of the Currency C. F. R. Title 12, Chap. I

"§4.5 *Authorizing branches and seasonal agencies—(a) Branch banks.* (1) Under the provisions of R. S. 5155, as amended; 12 U. S. C. 36, national banks may, subject to the approval of the Comptroller of the Currency, establish and operate branches and seasonal agencies. Upon receipt of an application from a national bank or any bank operating in the District of Columbia, for a branch or seasonal agency, the appropriate District Chief Examiner is instructed to make an investigation, taking into consideration the financial history and condition of the bank, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the number of branches now in operation and their location, the proposed location of the new branch and the distance from the head office, the nearest banking facilities, the convenience and needs of the community to be served by the new branch, the nature of the potential clientele and possible business available, including an estimate of contemplated volume within a reasonable period of time and the prospects of successful operation of the branch, together with any other pertinent factors.

"(2) The examiner's report is submitted to the District Chief Examiner who forwards it to this office with his own comments and recommendation. The information and data is analyzed, briefed and routed in the same way as an application for a charter.

"(3) If the decision is unfavorable the applicant bank is so notified. If the decision is favorable the Comptroller issues a formal certificate evidencing his approval and consent to the establishment and operation of a branch bank at the designated location.

"(b) *Removal of branch banks or branch offices.* A branch of a national banking association may not be moved

from one location to another without first obtaining the consent and approval of the Comptroller. The procedure for obtaining consent to such a moving of the location of a branch follows the same general course as that of the application for a branch, although the information required on any investigation made will vary with the circumstances and reasons given for the proposed move. If the approval is granted the Comptroller executes a formal statement to that effect, which is forwarded to the bank applying therefor."

* * *

APPENDIX B

Excerpts From Correspondence, Minutes and Other Documents Showing That National Bank of Detroit and Comptroller Regarded the Second Proviso of Section 34 of the Michigan Financial Institutions Act as Applicable to the Proposed Establishment by National Bank of Detroit of a Branch in Troy

Paragraph 12 of Stipulation of Facts

* * *

In June, 1955, shortly after the vote of the residents of the Troy Township area on June 7, 1955 to incorporate substantially all of that area (including the theretofore unincorporated Village of Big Beaver) it was reported to the Senior Executives of NBD that under State law if W-O should obtain approval of the branch at Big Beaver previously applied for by it and open such branch for business, no other bank could thereafter obtain approval of a branch in Troy. In view of the foregoing, the Senior Executives of NBD again reviewed the situation and on January 19, 1956 recommended to the Executive Committee of NBD that they be authorized to apply to the Comptroller for permission to establish a branch near the intersection of Maple and Crooks Roads in Troy. (JA 43a)

Minutes of Meeting of Executive Committee of Board of Directors of National Bank of Detroit held January 19, 1956

* * * While plans of the Wayne-Oakland Bank for the construction of a building in the Big Beaver Community on Rochester Road in the City of Troy have recently been reported in the press, there is no indication that the branch so authorized has been placed in operation. Our counsel is of the opinion that prior to the time the Wayne-Oakland branch commences operation there is no legal obstacle to the granting of authorization for the establishment and operation of branch offices by other outside banks, national or state, which otherwise qualify under Michigan law. * * * (JA 62a)

Letter from Vice-President and Cashier of National Bank of Detroit to Deputy Comptroller of the Currency Transmitting Application for Approval of Troy Branch of National Bank of Detroit

January 19, 1956

* * * Due to the provisions of the Michigan statute limiting the establishment of branches, once it (Wayne-Oakland Bank) does commence operation of that branch office no other outside bank will be able to establish a branch in the City of Troy. However, our counsel advise us that prior to that time there is no legal obstacle to the granting of authorization for the establishment and operation of branch offices by other outside banks, national or state, which otherwise qualify under Michigan law. * * * (JA 64a)

Letter from Vice-President of National Bank of Detroit to Deputy Comptroller of Currency

January 21, 1956

Following our conversation on the 20th, it is my thought that a summary of the points we discussed might be helpful

to you in reaching a decision on our application for a branch office in Troy.

Number One: The establishment of this office by our bank is permitted by the State law so long as no other bank or branch office is operating in the community—which is the case at this time. * * * (JA 81a)

Letter from Vice-President of National Bank of Detroit to Deputy Comptroller of Currency

February 23, 1956

* * *

The time element in our application for the branch in Troy is important inasmuch as approval must be granted before the Wayne-Oakland Bank opens its office at Rochester Road and Owendale in Troy. * * * (JA 84a)

Letter from Vice-President of National Bank of Detroit to Deputy Comptroller of Currency

March 14, 1956

* * *

We are waiting with anxiety in the hope that we will get your approval of our Troy office before the Wayne-Oakland Bank opens and thereby freezes us out, as can happen under Michigan law as we all know. (JA 87a)

Letter from Deputy Comptroller of the Currency to Commissioner of the Michigan Banking Department

March 19, 1956

* * *

Our reasons for approval of the National Bank of Detroit's application are as follows:

* * *

(3) Unless the National Bank of Detroit receives approval of its application for a branch office in the

City of Troy now, it will under present statutes be estopped from establishing a branch there after another banking office is in operation. * * * (JA 93a)

APPENDIX C

Analysis of Annual Reports of Comptroller of Currency to Congress 1922-1932

In his 1922 report (228a-230a), the then Comptroller of the Currency urged on Congress the enactment of branching legislation in very forceful terms. He said that the national banking system had been and should continue to be "the backbone of the Nation's financial structure"; that forces were at work "inevitably tending to the disintegration, or at least the progressive weakening of the Federal reserve system". In elaborating on this he pointed out that national banks were compelled to compete with state banks; that in many respects state laws were more liberal than national banking laws and constituted an inducement to banks to operate under state rather than federal law; that one respect in which the laws of many states were much more liberal than the national banking laws was in connection with the establishment of branches; that because of the advantages to operating under state laws many national banks were surrendering their federal charters and obtaining charters under state laws. After referring to the matter in some detail, the Comptroller said:

> "* * * we are in grave danger of losing our larger national banks in states where more liberal charters are granted to State banks unless we extend to national banks the privileges and facilities in carrying on their business that are accorded to State banks. If we lose the national banks, we disintegrate the Federal reserve system, for experience has shown that only a small proportion of State banks will enter the system." (R. 229a-230a)

This portion of his report concluded with a recommendation that Congress amend the national banking law to grant to national banks within the discretion of the Comptroller the privileges enjoyed in each state by its state banks (R. 230a).

In his reports for 1923 and 1924 the Comptroller again urged on Congress the elimination of this discrimination between state and national banks, giving the same reasons (R. 230a-231a). Legislation of this type was again urged on Congress in the 1925 report (R. 231a). Finally, in 1927, Congress amended Revised Statutes 5155 (12 U.S.C. 36) so as to grant some authority to national banks to establish branches. (Act of February 25, 1927, Public Law No. 639, Sixty-Ninth Congress). The principal feature of the 1927 Act was to grant a national bank the right to establish and operate *inside* branches "if such establishment and operation are at the time permitted to state banks by the law of the state in question". The amendment, however, limited the number of branches in a city according to the population of the city. But the proponents of branch banking halted only briefly in their efforts.

In his 1929 report, the Comptroller of the Currency again urged the passage of legislation enlarging the branching rights of national banks (R 232a-241a). He referred to the large number of bank failures that had taken place in the country in recent years and pointed out that failures of state banks greatly outnumbered those of national banks and that practically all of the failures, both state and national, had occurred in the small banks rather than those in the larger cities (R. 233a-234a). He frankly stated his position that the only feasible method of supplying necessary and safe banking facilities to the occupants of the outlying areas was to permit the large city banks to establish branches in the outlying areas, and that the economic welfare of the Country required it (R. 234a-235a). He obviously expected that this would result in the gradual elimination of the small banks in the outlying areas. He urged on

Congress the adoption of legislation which would permit a national bank to establish a branch anywhere in the "trade area" in which the bank was situated (R. 236a). In the creation of these trade areas state lines were to be disregarded, the indication being that in some instances a trade area might be as large as an entire Federal Reserve District and in some instances might even cross the boundary of Federal Reserve Districts. The facts set forth in the report gave a large measure of support to the arguments he advanced for the proposed legislation.

In 1930, the Comptroller again urged on Congress passage of such legislation, making largely the same arguments and setting forth certain additional facts to support them (R. 241a-247a) and the same recommendations were repeated in his 1931 and 1932 reports.